As we have already stated, these were found on a shelf in the *outer* cave, and were found by one of the combined party. This finding is the only evidence regarding this explosive.

It is uncertain from the evidence how long the appellants had been in the inner cave. The first appellant, in his statement to the police, said he had been there for three days, and that when he arrived the other two appellants were already there. The second and third appellants in their statements to the police only admitted having been there for one night.

But it must be remembered that the subject matter of the 3rd charge was found in the *outer* cave. In order to establish possession thereof in the three appellants the prosecution must prove :—

(a) that they had actual or potential physical control over this explosive, and

(b) the intention to exercise such control.

In our view the very meagre evidence led by the prosecution on this point fell far short of proving both (a) and (b).

Accordingly the appeals of all three appellants against their convictions on the 3rd charge must be allowed and their convictions and sentences in respect of that charge quashed.

The final result is that the first appellant's convictions on the 1st and 2nd charges and the sentence of death resulting therefrom stand, and the second and third appellants are convicted under Regulation 5 of the Emergency Regulations, 1948, and each of them sentenced to ten years rigorous imprisonment, to date from the 24th of November, 1948.

Order accordingly.

KONG WAI & ANOR. v. PUBLIC PROSECUTOR

[C. A. (Willan C.J., Spenser Wilkinson and Russell JJ.) December 24, 1948]

[K. L. — F. M. Criminal Appeal No. 146 of 1948]

Penal Code, s. 34 — Emergency Regulations, 1948, reg. 4 — Charge of joint possession of firearm — Common Intention — Direction.

In this case the two appellants and a third person were charged with being jointly in possession of firearms. The two appellants were convicted. In the course of his summing up the learned trial Judge said "If you apply your minds to the first charge, that is that the three prisoners were jointly in possession of these firearms, I have to tell you that it is the law that if a number of people set out with a common purpose which involves the use of firearms, if in the course of carrying out that purpose with these firearms, some of them have physical possession of firearms, that is — have firearms in their hands, and in the course of what is done they are used, then everyone — in that party who is there with the common intention of acting with the rest of the party is jointly in possession of the firearms which are in fact used."

Held: (1) the above direction does not set out accurately the law of common intention in this country; (2) the law of common intention in this country is laid down in s. 34 of the Penal Code and as there was no evidence in the present case from which a common intention to possess arms could reasonably be inferred, the conviction of the appellants must be quashed.

Semble: The use of the expression "joint possession" in connection with an offence such as possession of arms under Regulation 4 of the Emergency Regulations tends to obscure the necessity, in cases where more persons than one are joined in one charge, of proving, as against each of them that he was in fact in possession thereof.

Case referred to :—

(1) *Lee Yoon Choy v. Public Prosecutor ante* p. 167.

CRIMINAL APPEAL.

R. P. S. Rajasooria for the appellants.

F. G. Cooke (D. P. P.) for the respondent.

The judgment of the Court of Appeal was delivered by :—

Spenser Wilkinson J. : — The appellants were two of three accused charged with being jointly in possession of firearms. There was also an alternative charge against each of three of being in possession of the component parts of a firearm. In regard to the 2nd accused at the trial the learned trial Judge did not agree with the opinion of the Assessors and ordered a re-trial. The appellants, who were the 1st and 3rd accused at the trial, were both convicted on the main charge of joint possession and condemned to death. Against these convictions and sentences they appealed.

The charges arose out of an ambush by bandits of a motor car in which Mr. Clark, the dredge engineer at Tronoh Mines was travelling together with a driver and one Special Constable, at about 7.00 a.m. on the 28th July, 1948. The car, whilst being driven along the road towards the dredge, was subjected to a fusillade of rifle and automatic weapon fire. Although 19 shots hit the car and the driver was wounded the car was able to proceed and there were no other casualties.

After shooting at the car the bandits, who appear to have numbered about 20 or more and were armed with rifles and sten guns, proceeded a short distance across country to a row of bungalows and proceeded

to set fire to the staircase of one of the bungalows, which had previously been occupied by Mr. Clark, after which they all made off and disappeared.

Evidence was given by the Special Constable and by two labourers, (a) identifying the appellants and (b) as to the particular firearm with which each was armed. As to (b) there is a conflict of evidence, and this is, no doubt, the reason which prompted the prosecution to attempt to establish "joint possession" under the first charge.

Counsel for the appellants attacked the convictions upon the grounds of insufficiency and conflict of evidence. He did not in any way attack the directions of the learned trial Judge to the Assessors upon the law. In the view we take of this appeal it is unnecessary for us to go into the evidence in any detail and, indeed, as we are about to order a fresh trial for the reasons hereafter set out, it would be undesirable for us to do so.

Being in doubt as to whether a vital part of the directions of the learned trial Judge on the law were correct we desired to hear further argument as to the law and we granted an adjournment to enable the Deputy Public Prosecutor further to consider the matter. Having heard the further argument as to the law we have come to the conclusion that the directions of the learned trial Judge were not correct and that the conviction of the appellants cannot, therefore, stand.

In the course of his summing up the learned trial Judge stated the law relating to the first charge to be as follows:—

> If you apply your minds to the first charge, that is, that the three prisoners were jointly in possession of these firearms, I have to tell you that it is the law that if a number of people set out with a common purpose which involves the use of firearms, if in the course of carrying out that purpose with these firearms, some of them have physical possession of firearms, that is have firearms in their hands, and in the course of what is done they are used, then every one in that party who is there with the common intention of acting with the rest of the party is jointly in possession of the firearms which are in fact used.

That may well be an accurate statement of the law of England but it is not the law here. This Court has held, in the case of *Lee Yoon Choy & Others v. Public Prosecutor*[1] that the law as to common intention in this country is laid down in section 34 of the Penal Code. It is unnecessary for us to reiterate what has been said in the judgment in that case.

We think some confusion has arisen both in the present case and in the case just referred to from the insertion in the body of the charges of the word "jointly". There is no such specific offence as "joint possession". When two or more persons are charged with murder, the offence committed by each is none the less murder because their names are joined in one charge. The expression "joint possession" may be a convenient method of describing the state of affairs which exists when two or more persons are in possession of the same object at the same time; but when the expression is used in connection with an offence such as possession of arms under Regulation 4 it tends to obscure the necessity, in cases where more persons than one are joined in one charge, of proving as against each of them that he was in fact in possession thereof.

In our view there was no evidence in the present case from which a common intention to possess arms could reasonably be inferred.

The convictions and sentences of both appellants are, therefore, quashed and we order that both appellants be re-tried upon such charge as the Public Prosecutor may think fit to frame.

Re-trial Ordered.

PUBLIC PROSECUTOR v. RAJA

[A. Cr. J. (Spenser Wilkinson J.) March 2, 1949]

[K. L. — Criminal Appeal No. 53 of 1948]

Excise Rules, r. 92 — Possession of toddy to which water has been added — Scope of rule.

In this case the respondent was charged in that being a licensee and a person employed by the Government for the sale of toddy he had in his possession toddy to which water had been added. At the trial the learned Magistrate acquitted the respondent on the ground that the toddy was overnight toddy and not intended for sale to the public and therefore not within the scope of r. 92 of the Excise Rules which he held was meant to cover toddy which is for sale to the public.

Held: (1) the wording of r. 92 of the Excise Rules is clear and ambiguous and contained no exception in favour of overnight toddy nor of any other toddy that is not for sale to the public; (2) if the respondent was in possession of toddy to which water had been added, he was guilty of a contravention of r. 92.

[**Editorial Note:** Rule 92 of the Excise Rules, 1923 reads: "No licensee and no person employed by the Government for the sale of toddy shall have in his possession whether upon licensed premises or elsewhere any toddy to which there has been added any water, alcohol or sugar."]

Cases referred to:—

(1) *Rowland v. Public Prosecutor,* (1940) F.M.S.L.R. 16; (1940) M.L.J. 131.

(2) *Attorney-General v. Sillean,* 3 H. & C. 508.